Loo Kia Meng v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO C–05–88 OF 1995
SHAIK DAUD, ABDUL MALEK AHMAD AND MOKHTAR SIDIN JJCA
21 SEPTEMBER 1998

Criminal Law *— Dangerous Drugs — Statutory presumption — Chemist took 20 random samples for testing — Whether required minimum 10% to be tested was fulfilled — Dangerous Drugs Act 1952 s 37(j)*

Criminal Law *— Dangerous Drugs — Statutory presumption — Whether presumption of possession under s 37(d) could be used in invoking presumption of trafficking under s 37(da) — Dangerous Drugs Act 1952 s 37(d) & (da)*

Criminal Law *— Dangerous Drugs — Trafficking in dangerous drugs — Whether presumption of possession under s 37(d) could be used in invoking presumption of trafficking under s 37(da) — Dangerous Drugs Act 1952 ss 39B(1), 37(d) & (da)*

The appellant was convicted for trafficking in dangerous drugs, to wit 4,105g of cannabis, under s 39B(1) of the Dangerous Drugs Act 1952 ('the Act') and was sentenced to death under s 39B(2) of the Act. The appellant appealed contending that the trial judge did not make a finding that the appellant was in possession of the alleged cannabis. This was because what the judge did, when he made a finding that the appellant was in custody and control of the two packages containing the cannabis, was to invoke the presumption of possession under s 37(d) and then to invoke the presumption of trafficking under s 37(da) of the Act. The appellant also contended that the method of analysis adopted by the chemist was improper as it did not comply with s 37(j) of the Act which required a minimum of 10% to be taken for analysis from the receptacle in which the drug was found whereas the chemist took 20 random samples for testing.

Held, allowing the appeal, substituting the conviction and sentencing the appellant to 15 years imprisonment and ten strokes of the rotan:

(1) The learned judge had committed the same error as in *Muhammed bin Hassan*'s case when the legal presumption of possession under s 37(d) of the Act was applied upon the presumption of trafficking under s 37(da) in view of the amount of the drug involved. This was because the judge made no express affirmative finding of possession on the evidence which was required before the presumption of trafficking could be invoked under s 37(da) of the Act (see p 667G–H); *Muhammed bin Hassan v PP* [1998] 2 MLJ 273 followed.

(2) By virtue of s 37(j) of the Act, it is incumbent for the chemist to test a minimum of 10% of the drug. On the facts, the 20 random samples taken by the chemist could amount either to more or less than 10%. The court was thus left in doubt as to the amount of

A samples that was tested and the benefit of this doubt must be given to the appellant. As far as the charge of trafficking was concerned, the case against the appellant was not proved beyond a reasonable doubt (see p 668C–G); *Leong Bon Huat v PP* [1993] 3 MLJ 11 followed.

B

[Bahasa Malaysia summary

Perayu telah disabitkan untuk kesalahan pengedaran dadah berbahaya, iaitu 4,105g ganja, di bawah s 39B(1) Akta Dadah Berbahaya 1952 ('Akta tersebut') dan dijatuhkan hukuman mati di C bawah s 39B(2) Akta tersebut. Perayu membuat rayuan dengan menghujahkan bahawa hakim perbicaraan tidak memutuskan bahawa perayu memiliki ganja yang dikatakan. Ini adalah kerana apa yang dilakukan oleh hakim, apabila beliau memutuskan bahawa perayu mempunyai jagaan dan kawalan dua bungkusan yang mengandungi ganja tersebut, adalah beliau menggunakan andaian milikan di bawah D s 37(d) dan kemudiannya menggunakan andaian pengedaran di bawah s 37(da) Akta tersebut. Perayu juga berhujah bahawa cara analisis yang dipakai oleh ahli kimia adalah tidak wajar kerana ia tidak mematuhi s 37(j) Akta tersebut yang menghendaki pengambilan jumlah minima sebanyak 10% untuk tujuan analisis daripada E penyangga di mana dadah tersebut dijumpai sedangkan ahli kimia telah mengambil 20 contoh sembarang untuk menjalankan ujian.

Diputuskan, membenarkan rayuan, mengganti sabitan dan menghukum perayu kepada 15 tahun penjara dan 10 sebatan rotan:

F (1) Hakim yang arif telah melakukan kesilapan yang sama seperti dalam kes *Muhammed bin Hassan* apabila, memandangkan jumlah dadah yang terlibat, andaian milikan mengikut undang-undang di bawah s 37(d) Akta tersebut dipakai kepada andaian pengedaran di bawah s 37(da). Ini adalah kerana hakim tidak membuat sebarang keputusan mengiakan yang nyata tentang milikan ke G atas keterangan yang dikehendaki sebelum andaian pengedaran boleh digunakan di bawah s 37(da) Akta tersebut (lihat ms 667G–H); *Muhammed bin Hassan v PP* [1998] 2 MLJ 273 diikut.

(2) Disebabkan s 37(j) Akta tersebut, adalah menjadi tugas ahli kimia H untuk menguji sejumlah minima dadah tersebut sebanyak 10%. Berlandaskan fakta-fakta ini, 20 contoh sembarang yang diambil oleh ahli kimia mungkin lebih atau kurang daripada 10%. Maka mahkamah berada dalam keraguan mengenai jumlah contoh yang diuji dan manfaat keraguan ini mestilah diberikan kepada perayu. Sejauh mana pertuduhan pengedaran adalah berkaitan, kes I terhadap perayu tidak dibuktikan melampaui keraguan munasabah (lihat ms 668C–G); *Leong Bon Huat v PP* [1993] 3 MLJ 11 diikut.]

Notes

For cases on s 37(d),(da) Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 49–52.

For a case on s 37(j) Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) para 69.

For cases on s 39B(1) Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 113–116.

Cases referred to

Leong Bon Huat v PP [1993] 3 MLJ 11 (folld)

Muhammed bin Hassan v PP [1998] 2 MLJ 273 (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 6, 37(d), (j), (da), 39A(2), 39B(1)(a), (2)

Appeal from: Criminal Trial No 47–2 of 1991 (High Court, Temerloh)

Bachan Singh (*Bachan & Kartar*) for the appellant.

K Muniandy (Deputy Public Prosecutor) for the respondent.

Shaik Daud JCA (delivering the judgment of the court): This was an appeal from the decision of the Temerloh High Court which had convicted the appellant on 15 August 1995 for an offence of trafficking in 4,105g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and sentenced him to death under s 39B(2). The appellant was arrested on 13 January 1991 at about 8.30 pm by three police personnel who were on routine crime prevention rounds in Taman KSM Mentakab, Pahang. On entering a lane, the police personnel saw the appellant carrying two packages one in each hand. When the appellant came near them he stopped and when one of the personnel identified himself as the police, the appellant allegedly turned round and tried to run and in the process threw both the packages in the direction of a drain. The appellant was apprehended and the packages recovered. Both the packages were found to contain dried plant material suspected to be cannabis.

The contents of both packages were analyzed by the chemist who testified that the dried plant material amounting to 4,105g were cannabis as defined in s 2 of the Act.

At the hearing of the appeal before us, learned counsel for the appellant raised two important issues. Firstly, he argued that at no time did the learned judge made a finding that the appellant was in possession of the alleged cannabis. What the learned judge held was that as he found that the appellant was in custody and control of the two packages therefore the presumption under s 37(d) of the Act applies and he was deemed to be in possession of the cannabis. Having made that finding he then invoked the presumption under s 37(da) of the Act. In other words, he used the

A presumption of possession under s 37(d) of the Act to invoke the presumption of trafficking under s 37(da) of the Act. Therefore the learned judge fell into the same error as the learned judge in *Muhammed bin Hassan v PP* [1998] 2 MLJ 273.

In that case the issue is the same ie whether the presumption of
B trafficking under s 37(da) of the Act could be properly invoked once a presumption of possession under s 37(d) of the Act had been established. The Federal Court held that (see headnotes at [1998] 1 AMR pp 831–832):

> 3(a) As both sub-ss (d) and (da) of s 37 of the Act are penal provisions, they must be strictly construed and must not be extended beyond their clear meaning. Since the two sub-sections are clear and unequivocal their
> C meanings must be determined from the language employed and must mean exactly what they say. Any ambiguity or slip would be a matter for the legislature to consider.
>
> (b) There is a clear undeniable distinction between the word 'deemed' used in s 37(d) of the Act and the word 'found' employed in s 37(da) of the Act. Under s 37(d) there is
> D no need to prove actual possession or knowledge, as upon proof of custody or control by the prosecution, the court must in law draw a presumption of possession and knowledge in favour of the prosecution, unless the other party proves the contrary. On the other hand, the word 'found' in the opening phrase of s 37(da) connotes a finding made by the court after a trial by the court.
>
> (c) The basic or primary facts needed to raise 'deemed' possession and
> E 'deemed' knowledge under s 37(d) of the Act and those required to raise 'presumed ... trafficking' under s 37(da) are different. In order to invoke the presumption of possession and knowledge under s 37(d), one needs to only prove having had 'in custody or under ... control anything whatsoever containing' the drug whereas to arrive at the presumption of trafficking under s 37(da), proof of being 'in possession' of the drug is
> F necessary.
>
> (d) In view of the differences between the two sub-sections, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption. To constitute possession which would give rise to the presumption of 'trafficking' under s 37(da) there must be an express affirmative finding of possession on the evidence, as opposed
> G to reliance on the legal presumption of possession. The correct approach was to ascertain the meaning of the words employed by Parliament rather than the intention of Parliament.

We find that the situation in the present appeal is no different from that in *Muhammed bin Hassan*'s case. The learned judge here made no express
H affirmative finding of possession on the evidence. He merely relied on the legal presumption of possession under s 37(d) of the Act. Having done that, and in view of the amount of the drug involved, ie 4,105g, he proceeded to invoke the presumption of trafficking under s 37(da) of the Act. We find that the learned judge here had committed the same error when he applied one presumption upon another.

I The second issue was on the improper method of analysis adopted by the chemist. The chemist in his evidence testified that his analysis on the dried plant material consisted of four tests, ie physical examination,

microscopic examination, deguinos levine test and the thin layer chromatography test. For the physical and microscopic examinations he examined all the dried plant material. For the other two analysis he had to prepare chemical tests which necessitated the taking of representative samples. He testified that he took 20 random samples and after doing the chemical tests he concluded that all the dried plant material to be cannabis as defined in s 2 of the Act. Now under s 37(j) of the Act, the chemist is required to take a minimum of 10% from the receptacle in which the drug was found. The chemist merely said he took 20 random samples but nowhere has he said in his evidence that this 20 random samples represented at least 10% of the dried plant material. For all we know the 20 random samples may be more, or for that matter, may be less than 10%. It is incumbent upon the chemist to take a minimum of 10% by virtue of s 37(j) of the Act. We find that when he said he took 20 random samples, it is ambiguous as the 20 samples could be more or less than 10%. The learned DPP submitted that the 20 samples taken by the chemist represented a fair sample of the total. With respect, we are unable to agree with that submission because the 20 samples could well be much less than the 10% required to be taken. We hold that pursuant to s 37(j) of the Act, the chemist is required to give the actual amount or the actual weight of the samples taken in order to comply with that section.

In this respect, we refer to the case of *Leong Bon Huat v PP* [1993] 3 MLJ 11 where it was in the evidence of the chemist that the total weight of samples taken for analysis was 'more than 10%' of the net weight of the material. The Supreme Court held that the expression 'more than 10%' was ambiguous and there should be no ambiguity on such a matter where the life of a subject was at stake. The court also held that what was necessary was that the testimony of the chemist upon such a matter must be clear and convincing. In our present case the chemist did not even testify that he took 10% of the total weight of the plant material as required by s 37(j) of the Act. He merely said he took 20 samples, what, therefore, is the percentage of this 20 samples, is it 10%, less than 10% or more that 10%? We hold that the ambiguity here was far more serious. The court was left in doubt and the benefit of this doubt must be given to the appellant. We find that so far as the charge of trafficking was concerned, the case against the appellant was not proved beyond a reasonable doubt.

In the light of this finding we allowed the appeal, quashed the conviction of trafficking under s 39B(1)(a) of the Act and set aside the sentence of death imposed. We substituted a conviction under s 6 punishable under s 39A(2) of the Act. After hearing and considering submissions on sentence, we sentenced the appellant to 15 years imprisonment from the date of his arrest plus ten strokes of the rotan.

Appeal allowed and order accordingly

Reported by Chin En Tek